FILE COPY

Supreme Court, U. S.
FILED
SEP 8 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1971

No. 72-374

IDA OLUND,
Plaintiff-Appellee,

vs.

RUSSELL L. SWARTHOUT,
Defendant-Appellant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RUSSELL L. SWARTHOUT,
Pro Se,
3000 E. Jefferson Avenue, #202-2
Detroit, Michigan 48214
822-2400

THE HARRY LEAVY PRESS, DETROIT, MICHIGAN

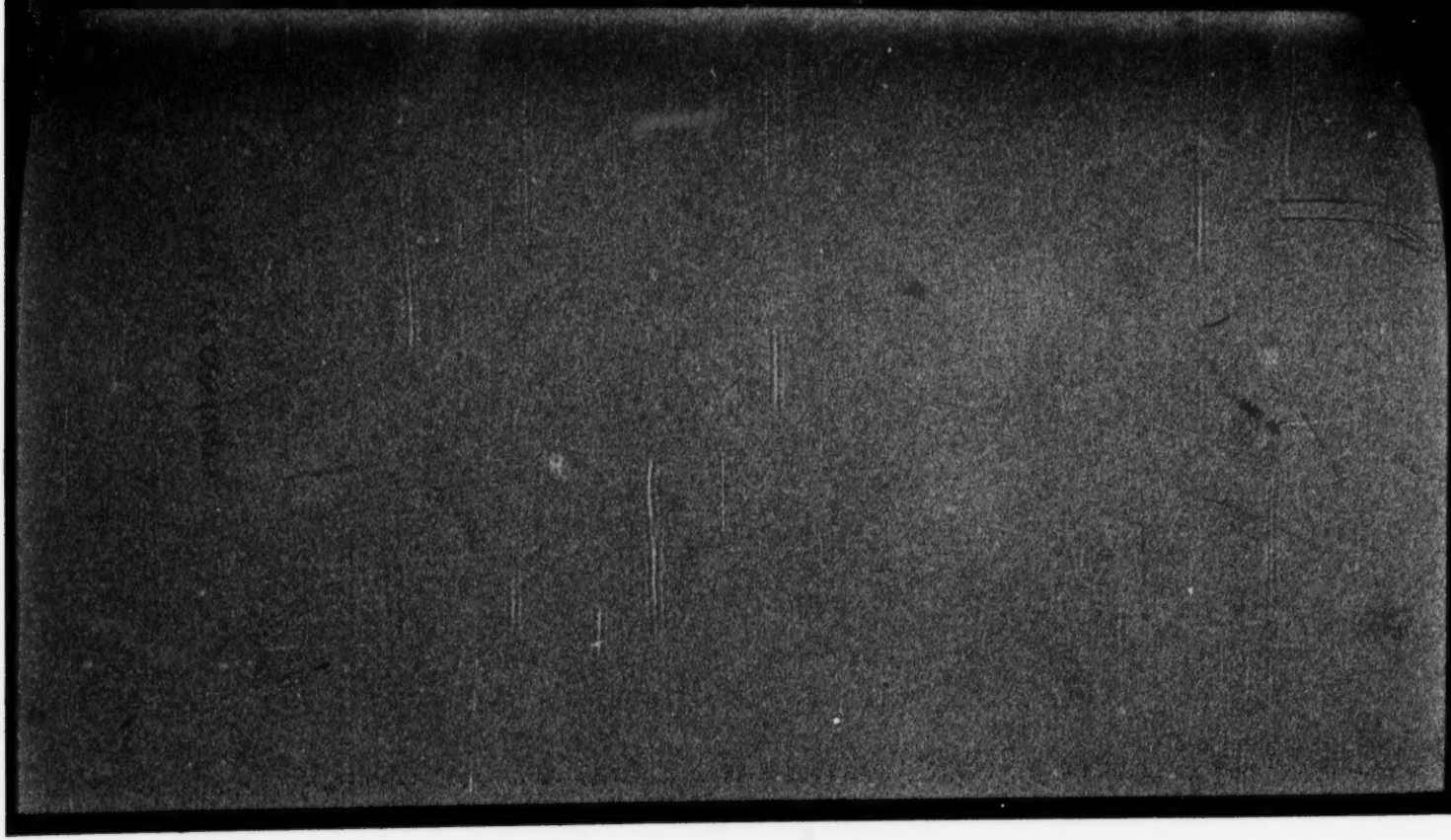

TABLE OF CONTENTS

	Page
OPINION BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISION INVOLVED	2
STATUTES INVOLVED	2
STATEMENT	3
REASONS FOR GRANTING WRIT	5
CONCLUSION	12
APPENDIX A	1a

TABLE OF AUTHORITIES

Cases:

A.M.F. Tuboscope, Inc. v. *Cunningham*, 352 F. 2d 150 (1965)	10
Connecticut General Life Ins. Co. v. *Breslin*, 332 F. 2d 928 (1964)	9
Malkin v. *Dubinsky*, 14 F.R.D. 38 (1953)	10
Olund v. *Swarthout*, 459 F. 2d 999 (1972)	5
Tights, Inc. v. *Stanley*, 441 F. 2d 336 (1971)	5, 9
Western Geophysical Co. of America v. *Bolt Assoc., Inc.*, 440 F. 2d 765 (1971)	9

Constitutional Provision:

The Seventh Amendment to the Constitution of the United States	10, 12

Statutes:

Federal Rules of Civil Procedure, Rule 7 (a), 28 U.S.C.A. ——— 9

Federal Rules of Civil Procedure, Rule 8 (e) (1), 28 U.S.C.A. ——— 6, 7, 9

Federal Rules of Civil Procedure, Rule 38 (b), 28 U.S.C.A. ——— 5, 6, 10

Federal Rules of Civil Procedure, Rule 39 (b), 28 U.S.C.A. ——— 10, 12

Other Authorities:

9 Wright and Miller, Federal Practice and Procedure, Civil, Sec. 2320, 2334 ——— 8, 11

IN THE

Supreme Court of the United States

October Term, 1971

No. .....

ERIKA OLUND,
Plaintiff-Appellee,

vs.

RUSSELL L. SWARTHOUT,
Defendant-Appellant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Russell L. Swarthout prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled cause on May 5, 1972.

OPINION BELOW

The opinion of the Court of Appeals for the Sixth Circuit, reported in 459 F. 2d 999 (1972), is printed in Appendix A hereto, infra, p. 1 a.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was decided and filed on May 5, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED

1. Did the Court of Appeals err in affirming the Trial Court's denial of a jury trial, to defendant on the issue of release after a timely demand, which is guaranteed to defendant both by the Constitution of the United States and Rule 38 (b) of the Federal Rules of Civil Procedure?

2. Assuming that defendant's Demand for Jury Trial on the issue of release, filed May 23, 1969, was not timely under Rule 38 (b) because of confusion over which of the plaintiff's replies was the last pleading directed to that issue, did the trial Court abuse its discretion in denying defendant's motion of May 27, 1969, for a jury trial on all issues, under Rule 39 (b), and especially the issue of release?

CONSTITUTIONAL PROVISIONS INVOLVED

The Seventh Amendment to the Constitution of the United States:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

STATUTES INVOLVED

Federal Rules of Civil Procedure, Rule 7 (a), 28 U.S.C.A.:

> (a) Pleadings. There shall be a complaint and an answer; and there shall be a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if leave is given under Rule 14 to summon a person who was not an original party; and there shall be a third-party answer, if a third-party complaint is served. No other pleading shall be al-

lowed, except that the court may order a reply to an answer or a third-party answer. As amended Dec. 27, 1946, effective March 19, 1948.

Federal Rules of Civil Procedure, Rule 8 (e) (1), 28 S.C.A.:

(e) Pleading To Be Concise and Direct; Consistency.

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

Federal Rules of Civil Procedure, Rule 38 (b), 28 S.C.A.:

(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at anytime after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.

Federal Rules of Civil Procedure, Rule 39 (b), 28 S.C.A.:

(b) By the Court. Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues.

STATEMENT

After commencement of plaintiff's tort action on Decem- 28, 1964, in the United States District Court For the stern District of Michigan, Southern Division, with isdiction founded on diversity of citizenship and an ount in controversy exceeding $10,000.00, a pretrial was

held on June 24, 1968. At that time, defendant requested and received permission from the Court to file an amendment to his answer in order to plead an affirmative defense of release. The defendant's Amendment to Answer and Exhibit was filed on June 27, 1968. Plaintiff subsequently tendered her reply to defendant's Amendment to Answer on July 5, 1968. Defendant then filed a Motion to Strike Plaintiff's Reply to Defendant's Amendment to Answer for plaintiff's failure to comply with Rule 8 (e) (1) of the Federal Rules of Civil Procedure. The hearing on defendant's motion was September 9, 1968; the District Court docket entry reflects: "Sept. 9, 1968/Deft's motion to strike pltf's reply to deft's affirmative defense withdrawn by Court—ptf. will submit another reply."

Seven months later plaintiff's failure to file another reply prompted defendant on April 1, 1969, to file an additional Motion to Strike Plaintiff's Reply to Defendant's Amendment to Answer, dated July 5, 1968. District Court docket entry recites: "Apr. 1, 1969/Motion to strike ptf's reply to deft's amendment to answer with supporting brief, affidavit and proof of service filed, Hearing Apr. 14/69."

On April 14, 1969, the Trial Court heard argument on this motion and ordered plaintiff to file another reply to defendant's Amendment to Answer within 30 days. The Plaintiff complied with this order by filing Plaintiff's Amended Reply to Defendant's Amendment to Answer on May 14, 1969. The defendant, on May 23, 1969, nine days later, filed a timely demand for jury trial not only as to the issue of release alone but also addressed his jury demand to all issues. District Court docket entry: "May 23, 1969/Deft's demand for jury trial, filed." The motion for a jury trial on all issues was heard on July 7, 1969, and denied by an order of the Court on September 18, 1969.

District Court docket entry: "Sept. 18, 1969/Order denying motion for a jury trial, with exhibit filed." Despite the assertion of the defendant that his timely filing of a jury demand, within ten (10) days after the service of the last pleading, which was the Plaintiff's Amended Reply to Defendant's Amendment to Answer, in accordance with Rule 38 (b) of the Federal Rules of Civil Procedure, entitled him to a jury determination as of right, at least on the issue of release; the Court alone then proceeded to hear and decided all the issues in favor of plaintiff.

REASONS FOR GRANTING THE WRIT

1. In affirming the Trial Court's denial of defendant's right to a trial by jury on the theory that the jury demand of the defendant was not timely within the meaning of Rule 38 (b), the Sixth Circuit Court of Appeals indulged in the following assumptions:

> "The Amended Reply, introduced no new issues into the action. The issue of release was asserted and joined in July, 1968". *Olund* v. *Swarthout*, 459 F. 2d 999.

The first premise by the Sixth Circuit that the Plaintiff's Amended Reply to Defendant's Amendment to Answer, dated May 14, 1969, introduced no new issues into the action is in error. In order to start the running of the ten day period during which a jury trial may be demanded under Rule 38 (b), a pleading is not required to raise a new issue, it may simply deny allegations contained in an opposing party's prior pleading which does raise a new issue or allege matters in avoidance of a claim set up in this prior pleading. *See Tights, Inc.* v. *Stanley*, 441 F. 2d 336 (1971), wherein at footnote 21 the Court stated:

> "Respondents assert that Tights failed to make timely demands for jury trial. However, the issues

> of validity and infringement raised by the respective counterclaims are, in each case, identical to the issues of validity and infringement raised by the original complaints. Thus, the last pleadings directed to those issues are the replies to the counterclaims. Since Tights joined its demand for jury trial with its reply in each case, the demands were clearly filed within the requisite ten-day period. See Federal Rules of Civil Procedure, Rule 38 (b)."

The second premise by the Sixth Circuit that the issue of release was asserted and joined in July, 1968, is in error. In order to place the question of release at issue and commence the running of the ten day period specified in Rule 38 (b), on July 5, 1968, Plaintiff's Reply to Defendant's Amendment to Answer must qualify as the last pleading directed to the issue of release. If plaintiff's reply did not meet the requirements of a pleading as set forth in the Federal Rules Of Civil Procedure, Rule 8 (e) (1), then it is a nullity which would neither place the matter of release at issue nor initiate the start of the ten day jury demand period. Since the reply cannot be considered a pleading (Appendix A, hereto, infra p. 5a, Plaintiff's Reply to Defendant's Amendment to Answer), the last pleading directed to the issue of release is the Court ordered plaintiff's amended reply (Appendix A, hereto, infra p. 9a, Order . . . Allowing Plaintiff Thirty Days to File Reply to Defendant's Amendment to Answer), filed by plaintiff on May 14, 1969.

Appellant contends that the record and docket entries of this cause amply demonstrate that the plaintiff's reply of July 5, 1968, was not a pleading acceptable to the Trial Court and therefore not a last pleading within Rule 38 (b). Immediately following service of plaintiff's reply defendant filed a Motion to Strike Plaintiff's Reply to Defen-

dant's Amendment to Answer because it did not conform to the requirements of a pleading as set forth in the Federal Rules of Civil Procedure, Rule 8 (e) (1). The hearing on this motion was held on September 9, 1968. It was agreed that an order be prepared by defendant's then attorney Robert Childs and submitted to plaintiff's counsel for approval, striking the plaintiff's reply and giving the plaintiff 30 days in which to file another reply. This is corroborated by Mr. Fisk, plaintiff's counsel, at a subsequent hearing held on April 14, 1969. The Trial Court heard argument on defendant's Motion to Strike Plaintiff's Reply to Defendant's Amendment to Answer. At page 19 of the hearing transcript, plaintiff's counsel stated:

> "I believe the hearing was held when Mr. Childs was here and when it was agreed in Court that I would file an amended reply to their Answer, on September ...., 1968. And Mr. Childs had then withdrawn from the proceedings, and we had a new attorney. So it was my understanding that such an order would be drafted and submitted to me, I would prove it, it would strike my earlier reply, and give me a reasonable time, 30 days if I recall correctly, in which to reply."

As averred in defendant's second Motion to Strike Plaintiff's Amended Reply to Defendant's Amendment to Answer, filed on April 1, 1969, defendant's attorney Childs had prepared and submitted a proposed order to plaintiff's attorney striking the first reply and giving plaintiff 30 days in which to file a new one. But, because Mr. Fisk never approved the proposed order it was never entered. However, it is apparent from the foregoing quote, that plaintiff's attorney was fully aware of his obligation to file a new reply but wholly neglected to do so until defendant's trial attorney, William A. Bedrosian, filed the

second motion to strike plaintiff's reply and plaintiff's attorney was ordered by the Court to file the new reply within 30 days after the entry of such order on April 14, 1969, (Appendix A hereto, infra, p. 9a, — Order . . . Allowing Plaintiff's Amended Reply to Defendant's Amendment to Answer). The order was honored by the plaintiff's filing of Plaintiff's Amended Reply to Defendant's Amendment to Answer on May 14, 1969.

There is only one inescapable conclusion, that the Sixth Circuit completely overlooked defendant's successful attack on the sufficiency of plaintiff's first reply which resulted in the order of the Court dated April 14, 1969, directing plaintiff to file another reply within 30 days.

Since the last reply by plaintiff was entitled Plaintiff's Amended Reply to Defendant's Amendment to Answer, the Court of Appeals relied on the authority of 9 Wright and Miller, Federal Practice and Procedure, Civil, Sec. 2320, which says in part:

> "... but the amendment does not revive a right previously waived, to demand jury trial on the issues already framed by the original pleadings. Nor does the late demand create a right to a jury trial on issues raised by the amended or supplemental pleadings if those issues were fairly raised by the original pleadings."

Thus the essential question is whether defendant's Amendment to Answer and plaintiff's reply thereto framed the issue of release or fairly raised it. The Trial Court did not think so, because it ordered plaintiff to file another reply which properly responded to defendant's affirmative allegations of release. Hence, the issue of release was not framed or fairly raised until the Court's order was complied with by the filing of Plaintiff's Amended Reply to Defendant's Amendment to Answer on May 14, 1969.

In addition, we are not presented here with the situation of a party voluntarily amending his pleadings and demanding at the same time a jury trial as in *Western Geophysical Co. of America* v. *Bolt Assoc., Inc.*, 440 F. 2d 765 (2d Cir. 1971), and *Connecticut General Life Insurance Company* v. *Breslin*, 332 F. 2d 928 (1964), which were relied on by the Sixth Circuit. Both cases are clearly distinguishable from this matter. First, plaintiff was ordered by the Court to amend a defective pleading. Second, the defendant, not the plaintiff, is demanding jury trial.

In considering defendant's timely jury demand, appellant would ask the Court to consider Tights, Inc., supra, which was decided approximately one month after Western Geophysical, supra. The Fourth Circuit ruled in Tights, Inc., that the plaintiff's reply was the last pleading directed to an issue asserted in defendant's counterclaim even though the issue was identical to one contained in plaintiff's original complaint and that a jury demand filed with the plaintiff's reply entitled plaintiff to a jury trial.

There appears to be a distinct conflict between the Fourth Circuit ruling on Tights, Inc., supra, and the Sixth Circuit interpretation in appellant's case. Put simply, if a counterclaim pleading an issue identical to one alleged in a prior complaint revives a right to a jury trial in Tights, Inc., supra, then a second reply addressed to the same issue as its predecessor would also bring back defendant's right. This conflict only the Supreme Court can resolve.

In summation, plaintiff's amended reply was a pleading within the meaning of Rule 7 (a), Federal Rules of Civil Procedure. It was ordered by the Trial Court. It was the last pleading directed to the issue of release, because plaintiff's reply was successfully attacked by defendant as being legally insufficient under Rule 8 (e) (1), Federal Rules of

Civil Procedure and is therefore a nullity of no force and effect whatever. Since defendant filed a timely jury demand within ten days of being served with the plaintiff's amended reply, he was entitled as a matter of right to a jury trial on the issue of release under Rule 38 (b), Federal Rules of Civil Procedure.

For the Trial Court to ignore defendant's timely jury demand and to hear the issue of release without a jury was an arbitary disregard of defendant's right to a jury trial and a violation of the Seventh Amendment to the Constitution of the United States.

2. Assuming for the sake of argument that defendant's jury demand was not timely because of confusion or mistake as to which of plaintiff's two replies to defendant's amendment to answer was a last pleading within the meaning of Rule 38 (b), defendant promptly followed up his jury demand on May 26, 1969 with a motion for jury trial on all issues under Rule 39 (b). The Court's denial of this motion with respect to the issue of release was clearly an abuse of discretion.

In a like situation another Federal Court granted a motion for jury trial where the demand was late because an amendment to a complaint and a stipulation caused confusion as to when the last pleading was served. *Malbis* v. *Dubinsky*, 14 F.R.D. 38 (1953). In a proper case, a trial Court will be reversed for abusing its discretion by denying a motion for a jury trial. *A.M.F. Tuboscope, Inc.* v. *Cunningham*, 352 F. 2d 150 (1965).

Furthermore, two opposing viewpoints have arisen in the various United States Courts of Appeals as to when discretion should be exercised by a trial judge under Rule 39 (b):

"There is a wide divergence of view on how a court should exercise its discretion on a motion under Rule 39 (b). It is the rule in some courts that 'the court should grant a jury trial in the absence of strong and compelling reasons to the contrary.' Elsewhere it has been held that the court has no discretion to grant jury trial when there was on timely demand unless there are special circumstances excusing the oversight or default." *9 Wright and Miller, Federal Practice and Procedure, Civil, Sec. 2334.*

Such a conflict can only be resolved in this Court by granting review.

Yet there is an added reason for granting defendant's motion for a jury trial not only with respect to release but on all issues. At the commencement of this lawsuit the defendant was serving on the bench in his resident municipality and is a member of the State Bar of Michigan. If the Court, without a jury, were placed in the precarious situation of deciding the question of damages and held, as it did, for the plaintiff; the defendant would then be heard to say that the court subconsciously acted prejudically to overcome the strong presumption which exists in the minds of all people — that when a member of the same profession makes decisions relating to another member of the bar he is not completely objective and unsympathetic to that member or the impact of the decision on all members of the bar — the profession itself. Since a decision for the defendant strengthens this existing assumption that the profession takes care of its own, it is not improbable that a judicial trier of the fact might feel an obligation to demonstrate impartiality by reaching a decision that ignores the proven facts totally unfavorable to the non-legal litigant. By submitting all the facts to a jury there would be no question,

consciously or subconsciously, of a complete, fair and impartial trial and *no extraordinary burden of judgment on the trier of the facts who took sixteen (16) months to decide this case.*

This case squarely presents two courses open to the federal judiciary: a continued commitment to the spirit of the 7th Amendment to the Constitution of the United States and a common law tradition stretching back several hundred years which favors jury determinations on questions of facts balanced against discouraging jury trials because as a Court will occasionally articulate in denying Rule 39 (b) motions, the docket is too overcrowded and it takes longer to try a case to a jury.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,
RUSSELL L. SWARTHOUT,
Pro Se,
8900 E. Jefferson Avenue, #202-3
Detroit, Michigan 48214
823-3420

No. 71-1716

UNITED STATES COURT OF APPEALS
For The Sixth Circuit

ERIKA OLUND,
Plaintiff-Appellee,

v.

RUSSELL L. SWARTHOUT,
Defendant-Appellant.

APPEAL from the United States District Court for the Eastern District of Michigan, Southern Division.

Decided and Filed May 5, 1972.

Before PHILLIPS, Chief Judge, McCREE, Circuit Judge, and ENGEL*, District Judge.

PHILLIPS, Chief Judge. This is an appeal from a judgment for plaintiff in a diversity tort action. We affirm.

Only a brief statement of the procedural facts is required. Erika Olund filed this action against Russell Swarthout in December, 1964. Swarthout answered in May, 1965, denying the material allegations of the complaint. Some three years later, following the pretrial conference, Swarthout amended the answer to interpose the affirmative defense of release. One week later Olund filed a reply to the amended answer, asserting that the release was void and unenforceable by reason of procurement through fraud, duress, coercion, and undue influence.

---

*Honorable Albert J. Engel, Judge, United States District Court for the Western District of Michigan, sitting by designation.

In May, 1969, Olund filed an amended reply to the amended answer. Swarthout filed a demand for a trial by jury as a matter of right on all issues nine days thereafter. He futher moved for a jury trial on all issues as a matter of discreation. Following a hearing on the motion, Judge Thomas P. Thornton denied the motion and ordered the entire case tried without a jury.

Trial to the Court consumed five trial days; conflicting evidence was introduced as to all material issues. Judge Thornton found for plaintiff in the amount of $15,000 compensatory damages. Swarthout appeals, contending that he was deprived of his right to trial by jury and that the verdict was unsupported by the evidence and excessive.

Only the jury trial issue requires extended consideration. The Federal Rules of Civil Procedure provide:

"Rule 38.
"JURY TRIAL OF RIGHT
• • •

"(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party."

"Rule 39.
"TRIAL BY JURY OR BY THE COURT
• • •

"(b) By the Court. Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to

demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issue."

Before this Court Swarthout contends that the filing of Olund's amended reply gave him ten days in which to demand a jury trial on the issues presented therein and that his demand was served within that ten day period. He further asserts that a jury trial on all issues should have been ordered as a discretionary matter. We disagree with these contentions. The demand for trial by jury was first injected into the case some four and one-half years after the action was commenced, following pleading amendments, extensive discovery, and a pretrial conference. The amended reply introduced no new issues into the action. The issue of release was asserted and joined in July, 1968. Under these circumstances, the demand was untimely. *See Western Geophysical Co. of America* v. *Bolt Assoc., Inc.* 440 F. 2d 765, 769 (2d Cir. 1971); *Connecticut General Life Ins. Co.* v. *Breslin*, 332 F. 2d 928, 931 (5th Cir. 1964); 5 Moore, Federal Practice, ¶ 38.41 (2d ed.); 9 Wright & Miller, Federal Practice & Procedure, Civil § 2320. Further, we find no abuse of discretion under R. 39(b), Fed. R. Civ. P.

Swarthout's contentions that there is insufficient evidence to support the findings of liability, unenforceability of the release signed by Olund, and amont of damages are wholly without merit. We have given "due regard . . . to the opportunity of the trial court to judge the credibility of the witnesses' and are unable to say that his findings of fact are clearly erroneous. R. 52(a), Fed. R. Civ. P.

Swarthout also urges that the release could not be avoided by Olund without tender of the consideration given in ex-

change therefor, relying on the law of Florida, where the release was executed. We need not reach this issue. The judgment was offset by the consideration. This court "must disregard any error . . . which does not affect the substantial rights of the parties." R. 61, Fed. R. Civ. P.; *see* 28 U.S.C. § 2111. Further, the issue was not raised below and will not be considered on appeal. *See Wiper* v. *Great Lakes Engineering Works,* 340 F. 2d 727, 731 (6th Cir.), *cert. denied,* 382 U.S. 812 (1965).

Affirmed.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ERIKA OLUND,
Plaintiff,

vs. Civil Action No. 16184

RUSSELL SWARTHOUT,
Defendant.

PLAINTIFF'S REPLY TO DEFENDANT'S AMENDMENT TO ANSWER

In Reply to Defendant's Amendment to Defendant's Answer wherein is added what is therein described as "an additional Special and Affirmative Defense", and in accordance with the proceedings of the Court and the agreement of the parties at the Pre-Trial Conference held June 24, 1968, Plaintiff, by her Attorney, GEORGE F. FISK, files this Reply; and Plaintiff says:

I

Replying to Paragraph III, Plaintiff says that the said alleged Release is without legal effect or validity for the following facts and reasons:

(A)—That Plaintiff signed the alleged Release only because of the coercion and duress and undue influence exercised upon, and against her, as hereafter set forth;

(B)—That on the day or days shortly before the date of and the signing of the alleged Release, the Defendant and the Defendant's friend, agent and assistant, Thomas G. O'Connell (who later witnessed

the alleged Release) had threatened and menaced Plaintiff with words to the effect that Plaintiff would lose her job and otherwise regret it if Plaintiff caused Defendant any trouble at all; further, Plaintiff was convinced that these threats could be, and would be, carried out unless she complied with Defendant's wishes in the matter;

(C)—That Plaintiff signed the alleged Release when under great emotional strain; when in fear of the Defendant who had earlier treated her with great violence; also when in fear of Defendant's friend, agent and assistant who had earlier threatened her great harm; also at a time when Plaintiff was alone in her home with no counsel or friend to support or help her deal with Defendant and his friend and agent, both of whom were Lawyers and Judges at all times when they dealt with Plaintiff in reference to the signing of the alleged Release;

(D)—That at no time was there any effort at reasonable discussion or negotiation, but only the emotional and menacing demand and insistence that Plaintiff sign the single copy of the Release which the Defendant had brought with him, and that Plaintiff accept possession of the $1,000.00 cash which the Defendant had brought with him;

(E)—That Plaintiff requested a copy of the Release before signing, and one was hastily typed and signed by all present; when the signatures were obtained, the Defendant and his friend hurriedly left the premises; a "copy" of the second signed copy of the alleged Release is attached to this reply and made a part hereof;

(F)—That Plaintiff was at the time and place mentioned, *because* of the traumatic injury she had suffered from Defendant, *because* of the threats and menaces made against her by Defendant and his friend, *because* of the quite incredulous and unsympathetic treatment she had received from the police, *because* of the knowledge that no Attorney desired a case against another Attorney, particularly when that other Attorney was also a Judge (and had friends who were Judges), weakened, frustrated, fearful, and, hence, very susceptible to the type of coercion inflicted upon her;

(G)—The alleged Release, signed under the circumstances described, *was drafted by the Defendant, an Attorney,* and covers with great particularity all of the many types of causes and actions which it purports to release; it then has a clause which clearly establishes that the intent of the Release was not to, and did not, apply to one class of actions, namely, actions founded on "criminal acts of violence xxx of any nature whatsoever"; and Plaintiff's Complaint in the captioned cause clearly falls within those excluded "criminal acts of violence xxx of any nature whatsoever".

WHEREFORE, Plaintiff asks Judgment as prayed in the Complaint.

/s/ GEORGE F. FISK,
Attorney for Plaintiff
2060 Coolidge Highway
Berkley, Michigan 48072
Lincoln 6-3636

Dated: July 2, 1968
Berkley, Michigan

Release

I, Erica Olund of Miami, Florida, for and in consideration of One Dollar, to me in hand paid by r. Swarthout, do by these presents for myself, my heirs, executors and administrators, remise, release and forever discharge Russell Swarthout, of Detroit, Mich. his heirs, executors, and Administrators, of and from any and all manner of action or actions, cause and causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, argeements, promises, trespasses, damages, judgments, executions, claims, and demands whatsoever, in law or equity, which against him I have had, now have, or which my heirs, executors, or administrators, hereafter can, shall, or may have, for or by reason of any matter, cause, or thing whatsoever.

I further state freely and voluntarily that Russell Swarthout has at no time ever committed any criminal act of violence towards me, or upon my being, of any nature whatsoever.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this First day of March, 1963.

/s/ ERIKA OLUND

IN THE PRESENCE OF:
/s/ R. L. SWARTHOUT
/s/ T. G. O'CONNELL

Mar. 1, 1963

I, Russell L. Swarthout will not proceed either civil or criminally against Erica Olund for any past acts or present acts as of this date.

/s/ R. L. SWARTHOUT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ERIKA OLAND,
Plaintiff,

vs.

RUSSELL L. SWARTHOUT,
Defendant.

Civil Action No. 26184

ORDER REQUIRING PLAINTIFF TO POST SECURITY BOND FOR COSTS AND ALLOWING PLAINTIFF THIRTY DAYS TO FILE REPLY TO DEFENDANT'S AMENDMENT TO ANSWER

At a session of said Court, held in the Federal Building, in the City of Detroit, County of Wayne, State of Michigan, this 14th day of April, 1969.

PRESENT: HONORABLE THOMAS P. THORNTON, Judge, United States District Court.

This matter having been brought on for hearing on Defendant's Motion To Require Plaintiff To Post Security Bond For Costs and also on Defendant's Motion To Strike Plaintiff's Reply To Defendant's Amendment To Answer, and the Court being fully advised in the premises, and after oral argument by counsel for respective parties,

IT IS HEREBY ORDERED that the Plaintiff Erika Olund, be required to post a Five Hunderd ($500.00) Dollar bond as security for costs incurred by the Defendant;

IT IS FURTHER ORDERED that the Plaintiff, Erika Olund, through her attorney, George F. Fisk, be allowed

thirty (30) days from the date of the signing of this order to reply to Defendant's Amendment To Answer.

THOMAS R. THORNTON
District Judge

A TRUE COPY
FREDERICK W. JOHNSON, Clerk
/s/ By: KATHLEEN FARNSWORTH,
Deputy Clerk

TABLE OF CONTENTS

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions Involved	2
Statutes Involved	2-3
Statement of Facts	3-6
Reasons the Writ Should Be Denied	6-8
Conclusion	8
Appendix A—Docket Entries	1a
Appendix B—Defendant's Amendment to Answer	7a
Appendix C—Plaintiff's Reply to Defendant's Amendment to Answer	9a
Appendix D—Plaintiff's Amended Reply to Defendant's Amendment to Answer	13a
Appendix E—Demand for Jury Trial	16a
Appendix F—Excerpt from Motion to Strike Plaintiff's Reply to Defendant's Amendment to Answer	16a
Appendix G—Excerpt from Memorandum Brief in Support of Motion to Strike Plaintiff's Reply to Defendant's Amendment to Answer	17a
Appendix H—Order Denying Motion for a Jury Trial	18a-23a

INDEX TO AUTHORITIES

	Page
Federal Rules of Civil Procedure:	
Rule 38 (b), 28 U.S.C.A.	2
Rule 39 (b), 28 U.S.C.A.	2
Rule 38 (d), 28 U.S.C.A.	3
Rule 8, (c), 28 U.S.C.A.	3
Cases:	
Olund v. Swarthout, 459 F. 2d 999	6
Olund v. Swarthout, Dist. Ct., Mich. S. Div. Case No. 16184	18a-23a
Sleeman v. Chesapeake & Ohio Railroad Company, 263 F. Supp. 117 (W.D. Mich 1967) (and cases cited therein)	19a
Texts:	
2B Barron & Holtzoff, Federal Practice and Procedure, §873, pp 35-6 (Rules Ed, 1961)	19a

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-374

ERIKA OLUND,
Plaintiff-Appellee,
vs.
RUSSELL L. SWARTHOUT,
Defendant-Appellant.

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Erika Olund prays that the Petition for a Writ of Certiorari filed in the captioned matter by Russell L. Swarthout, Defendant-Appellant, be denied.

OPINION BELOW

Accepted as set forth in the Petition.

JURISDICTION

Accepted as set forth in Petition.

QUESTIONS PRESENTED

1. Did the Defendant preserve his right to Jury Trial as required by Rules 38 (b) and 38 (d) of the Federal Rules of Civil Procedure, the reasonableness and constitutionality of which is not in issue; viz, was Demand timely filed?

2. Assuming the Defendant's Demand for Jury Trial was not timely filed, did the Trial Court abuse its discretion in denying Defendant's Motion for Jury Trial on all issues, or solely on the issue of the release; said discretion being granted by Rule 39 (b) of the Federal Rules of Civil Procedure?

3. Did Defendant's omission to use his timely remedy and file a Petition for Writ of Mandamus to obtain a Jury Trial, followed by his proceeding to the trial which lasted five days and involved great preparation, time and expense to the parties and to the State, and the time and travel of numerous witnesses including two medical experts, make unavailable to him the delayed remedy of review which he now seeks?

CONSTITUTIONL PROVISIONS INVOLVED

Accepted as stated in the Petition for Writ of Certiorari.

STATUTES INVOLVED

Accepted as stated in the Petition for Writ of Certiorari, but adding thereto

Federal Rules of Civil Procedure, Rule 38 (d), 28 U.S.C.A.:

> (d) Waiver. The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5 (d) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

Federal Rules of Civil Procedure, Rule 8 (c), 28 U.S.C.A.:

> (c) Affirmaitive Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

STATEMENT OF FACTS

Plaintiff filed her Complaint alleging a brutal and intentional and damaging violence inflicted upon her, the filing date thereof being December 28, 1964, jurisdiction being based on diversity of citizenship and an amount in controversy exceeding $10,000.00. Defendant appeared by Counsel on December 29, 1964. On March 15, 1965, a substitution of a second and new Attorney for Defendant was filed. An Amended Complaint was filed May 3, 1965; Answer thereto was filed May 24, 1965, which substantially denied all alle-

gations, but set forth no affirmative defense; no Demand for Jury Trial was filed at any time until as later recited herein. Seventeen entries on the docket then following intervene relating largely to discovery, until more than three years later on June 24, 1968, the Pre-Trial was had. Then on June 27, 1968, the "Amendment to Answer with Exhibit", alleging the affirmative defense of an allegedly valid written release dated March 1, 1963, was filed, and the next docket entry is on July 5, 1968 and reads "Plaintiff's Reply to Defendant's Amendment to Answer and Exhibit Filed". On July 18, 1968, Defendant filed a Motion to Strike Plaintiff's Reply, and a Motion to Dismiss, and for Hearing in advance of trial. On July 18, 1968, Notice of Trial for November 12, 1968 had been filed. On September 9, 1968, in open Court by agreement of the parties, the Court withdrew Defendant's Motion and entered no Order, but Plaintiff's Attorney agreed to file another Reply if such Order were entered after approval by Plaintiff's Counsel and signing by the Court. AFTER these proceedings and on the same date, September 9, 1968, the Defendant filed another substitution for a third and new Attorney. On November 8, 1968 Trial was adjourned without date at request of Counsel. Between September 9, 1968 and April 14, 1969, four depositions, preparatory to trial, were taken in Florida and filed with the Court in Detroit, Michigan. The Docket discloses on April 14, 1969, the following entry "Motion to Dismiss or Assess Costs and Motion to Strike Plaintiff's Reply to Amended Answer heard and denied—reply to be filed by Plaintiff in 30 days; motion of Defendant to require Plaintiff to post security bond for costs heard and granted—Court orders $500.00 security bond to be posted." On May 14, 1969 the Bond was filed, and also an Amended Reply to Defendant's Amendment to Answer was filed, which attempted to be more concise. (Com-

pare the two replies, being each set forth in the Appendix hereto). On May 23, 1969 Defendant filed his Demand for Jury Trial, and then on May 27, 1969 Defendant filed a Motion for Jury Trial on all issues, and after hearing thereon held on July 7, 1969, then on September 18, 1969 Judge Thornton made and entered his Order Denying the Motion for Jury Trial. Thereafter, four trial depositions were taken, and filed; the trial once again adjourned at request of Counsel, Notice of Trial for December 16, 1969 was filed on November 14, 1969; no further delay was sought or granted; Trial started at 9:00 A.M. on Monday, December 16, 1969, both parties indicating they were ready for trial, and trial continued without interruption through December 23, 1969. On April 16, 1971, the Court filed its Memorandum of Decision, findings of fact and conclusion of law, and on June 9, 1971, Judgment was entered on the decision.

The following significant documents which support the above statement of facts are printed in the Appendices to this Brief, labelled as follows:

Appendix A—Docket of Trial Court.....Page 1a

Appendix B—Defendant's Amendment to Answer .....Page 7a

Appendix C—Plaintiff's Reply to Defendant's Amendment to Answer*.....Page 9a

Appendix D—Plaintiff's Amended Reply to Defendant's Amendment to Answer** .....Page 13a

---

* and **—the copy of Plaintiff's Reply appearing at page 5a of Swarthout's Petition for Certiorari does not accurately reflect the Exhibit which was attached to both Plaintiff's Reply and Plaintiff's Amended Reply in that it deletes what Mrs. Olund initially typed, and which she was forced to *strike out* by the two Judges (Swarthout and O'Connell) who witnessed the alleged release.

Appendix E—Defendant's Demand for Jury Trial filed May 23, 1969.....Page 16a

Appendix F—Excerpt from Defendant's Motion to Strike filed April 1, 1969, being final paragraph and prayer thereof .....Page 16a

Appendix G—Excerpt from Defendant's Memorandum Brief in Support of Motion to Strike Plaintiff's Reply to Defendant's Amendment to Answer filed April 1, 1969, being last paragraph and final prayer thereof .....Page 17a

Appendix H—Trial Court's Order Denying Motion for a Jury Trial.....Page 18a

REASONS THE WRIT SHOULD BE DENIED

1. For the reason assigned by the unanimous decision of the Sixth Circuit Court of Appeals, and is so clearly established by a comparison of the Reply and the Amended Reply:

> "The Amended Reply, introduced no new issues into the action. The issue of release was asserted and joined in July, 1968". *Olund v. Swarthout*, 459 F. 2d 999.

2. For the additional reason assigned by the Trial Court, and not repudiated by the Sixth Circuit Court of Appeals, in its opinion

> "During the course of this litigation there have been multiple court hearings held in the matter, and at all times the defendant has been represented by extremely competent counsel. Pretrials have been held, amendments have been filed, the defense of release was first injected into the litigation in June

of 1968, and the real issues to be litigated have been a matter of knowledge to respective counsel since the inception of the lawsuit, with the result that the time for demanding a jury 'has long since passed away' and, accordingly, the motion for a jury trial is denied."

3. Neither the Sixth Circuit Court's nor the Trial Court's Opinion make any statements that would require a Court to conclude that there were not also other good reasons for their decisions.

4. For the reason that this Defendant had ample time to file a Petition for Mandamus and resolve this question prior to trial, but, in fact, appeared for trial, stated he was ready, and proceeded through five days of trial, costly to the parties, the State and the numerous citizens who testified.

5. The authorities quoted by the Trial Court and the Sixth Circuit Court of Appeals most amply sustain the action of those Courts, and reference is made to them as set forth in the Appendix to this Brief.

6. To grant Defendant the relief he now seeks at this stage of the proceedings would cast an intolerable financial strain on the Plaintiff, resulting directly from this Defendant's own delays and omissions, and in reality make Rule 38 (d) and also Rule 8 (c) of Federal Rules of Civil Procedure a dangerous trap on which no Court or citizen could rely. The rule should not be allowed to be subject to the devious delays and withholding of known issues, as was clearly done in this case. A party should be entitled to know at an early date whether he or she is faced with the greater time, burden and expense and differing problems that are involved in a Jury Trial.

7. Because in truth, even if this Defendant could extend his time for filing a Demand for Jury Trial by either

withholding a known valid issue, or by creating at a later date a weak or fictitious affirmative defense, then the case would be at issue when the *added affirmative defense (here release) was filed,* as no reply is permitted or required in the absence of an Order of the Court requiring the same, as is expressly provided in Rule 7 (a) of the Federal Rules of Civil Procedure; and a Court speaks only through its Orders, and Petitioner can show no express Order requiring Plaintiff to file either the originally filed Reply nor the Amended Reply. Harmless surplusage permitted by the Court should not extend the time, particularly in view of the other compelling reasons recited.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied, and there should be awarded to respondent, Erika Olund, such costs and fees as are allowed by law and rule of this Court.

Respectfully submitted,

GEORGE F. FISK
Attorney for Plaintiff-Appellee
2060 Coolidge Highway
Berkley, Michigan 48072
LIncoln 6-3636

APPENDIX A

DOCKET ENTRIES

1964

Dec. 28. Filing fee of $15.00 received.
Dec. 29. C.D. 125 $15.00 disbursed.
Dec. 28. Complaint and bill of particulars, filed.
Dec. 29. Appearance filed.
Dec. 29. Stip. and motion to suppress with affidavit filed.
Dec. 30. Notice of taking deposition with proof of service filed.

1965

Jan. 4. Objections to inadequate and unreasonable "Notice of taking of deposition" of ptf., etc., filed.
Jan. 4. Temporary Restraining Order filed, and entered. Thornton, J.
Jan. 4. Summons filed.
Jan. 4. Motion to suppress adj. w/o date. Hearing on temporary restraining order. Temporary restraining order as to taking of ptf's deposition is granted. Thornton, J.
Jan. 5. Hearing had on objections to temporary restraining order. Thornton, J.
Jan. 11. Objections to taking of depositions, etc., adj. to Jan. 25/65. Thornton, J.
Jan. 18. Motion to dismiss with affidavit filed.
Jan. 20. Proof of service filed.
Jan. 25. Objections to taking deposition adj. to Feb. 8/65.
Feb. 1. Motion to dismiss adj. to Feb. 8/65.
Feb. 8. Objections to taking deposition and motion to dismiss adj. to Feb. 15/65.

Feb. 15. Motion to dismiss and objections to taking deposition, adj. to Mar. 8/65.

Mar. 8. Motion to dismiss and objections to taking deposition, adj. to Mar. 15/65.

Mar. 15. Motion and order permitting substitution of counsel for deft., filed and entered.

Mar. 15. Appearance of deft. filed.

Mar. 15. Consent to substitution filed.

Mar. 15. Motion to dismiss and objections to taking deposition adj. to Apr. 19/65.

Apr. 19. Motion to dismiss and objections to taking deposition adj. to May 3/65.

May 3. Amended complaint filed.

May 3. Motion to dismiss denied. Objections to taking deposition heard. Matter held in abeyance until interrogatories are submitted, Thornton, J.

May 10. Order dismissing deft's motion to dismiss w/o prejudice filed and entered. Thornton, J.

May 24. Answer to amended complaint filed.

June 16. Motion to require ptf. to post a security cost bond filed—Hearing June 2.

Aug. 23. Motion to require ptf. to post a security cost bond heard and denied. Thornton, J.

Aug. 27. Order denying deft's motion to require ptf. to post a security cost bond, filed and entered. Thornton, J.

Sept. 2. Deft's motion for physical and mental examination of ptf. pursuant to rule 35, filed. Hearing Sept. 13/65.

Sept. 13. Motion for physical and mental examination of ptf. adj. to Sept. 27/65. Thornton, J.

Sept. 27. Order for physical and mental examination of ptf., filed and entered. Thornton, J.

Dec. 21. Deft's interrogatories to ptf., filed.

1966

Apr. 7. Stip. and order extending time for ptf. to file ptf's sworn answers to deft's written interrogatories dated Dec. 20/65, filed and entered. Thornton, J.

Apr. 28. Written interrogatories propounded by ptf. to deft. pursuant to Federal Civil Rule 33, filed.

Apr. 28. Ptf's sworn answers to deft's written interrogatories propounded by deft. under date of Dec. 20/65, filed.

May 13. Deft's objections to written interrogatories propounded by ptf. pursuant to Fed. Civil Rule 33 and proof of service, filed.

May 18. Stip. and order to extend time, file interroga tories and to adjourn hearing on objections to June 13/66, filed and entered. Thornton. J.

May 23. Deft's objections to written interrogatories adj. to June 13/66. Thornton, J.

May 26. Answers of deft. to interrigatories of ptf., filed.

June 2. Ptf's response to: deft's objections to written interrogatories propounded by ptf. pursuant to F.C.R. 33, filed.

June 13. Hearing had on objections to written interrogatories and adj. to Sept. 12/66. Thornton, J.

Sept. 12. Hearing had on objections to written interrogatories and adj. to Sept. 26/66. Thornton, J.

Sept. 26. Objections to interrogatories heard in part and adj. without date. Thornton, J.

1968

June 7. Notice of pre-trial conference for June 17/68, filed.

June 17. Pre-trial adj. to June 24/68. Thornton, J.

June 24. Pre-trial had. Thornton, J.

June 27. Amendment to answer and exhibit, filed.

July 5. Ptf's reply to deft's amendment to answer and exhibit, filed.

July 18. Deft's motion to strike ptf's reply to deft's affirmative defense and motion to dismiss pursuant to instant request for a hearing in advance of trial of special and affirmative defense, filed. Hearing Aug. 19/68.

July 18. Notice of trial for Nov. 12/68, filed.

Aug. 19. Motion to strike and dismiss adj. to Sept. 9/68. Thornton, J.

Sept. 9. Stip. and order for substitution of attorney for deft., filed and entered. Thornton, J.

Sept. 9. Consent substitution of attorneys for deft., filed.

Sept. 9. Deft's motion to strike ptf's reply to deft's affirmative defense withdrawn by Court—ptf. will submit another reply. Thornton, J.

Nov. 8. Trial adj. without date, request of counsel. Thornton, J.

1969

Feb. 17. Notices of taking deposition with proofs of service (4), filed.

Mar. 17. Deposition of Erika Olund, filed.

Apr. 1. Deposition of Dr. Bernard David Abel, filed.

Apr. 1. Motion to dismiss complaint or in the alternative to assess costs, with supporting affidavit, exhibits, memorandum and proof of service, filed. Hearing Apr. 14/69.

Apr. 1. Motion to require ptf. to post security bond for costs with supporting brief, and proof of service filed. Hearing Apr. 14/69.

Apr. 1. Motion to strike ptf's reply to deft's Amendment to Answer with supporting brief, affidavit and proof of service filed. Hearing Apr. 14/69.

Apr. 2. Deposition of Charles G. Lynch, Jr., filed.

Apr. 2. Deposition of Thomas J. Spurlock, filed.

Apr. 14. Motion to dismiss or assess costs and motion to strike ptf's reply to amended answer heard and denied—reply to be filed by ptf. in 30 days; motion of deft. to require ptf. to post security bond for costs heard and granted—Court orders $500.00 security bond to be posted. Thornton, J.

Apr. 15. Order requiring ptf. to post security bond and allowing 30 days to file reply to amended answer, filed and entered. Thornton, J.

May 14. Bond for security for costs in $500.00, filed. Hanover Ins. Co., surety.

May 14. Ptf's amended reply to deft's amendment to answer and exhibit, filed.

May 23. Deft's demand for jury trial, filed.

May 27. Deft's motion for jury trial pertaining to all issues in the above entitled cause with supporting brief, filed. (Proof of service attached)

June 9. Motion for jury trial, etc. adj. to July 7/69 Thornton, J.

July 7. Motion for jury trial, heard and taken under advisement. Thornton, J.

July 15. Notice of trial for Nov. 4/69, filed.

July 16. Extraction from calendar of significant dates bearing on defendant's motion for order granting jury trial, filed.

Aug. 21. Notice of taking deposition (3) filed.

Sept. 2. Notice of taking deposition and proof of service, filed.

Sept. 18. Order denying motion for a jury trial, with exhibit, filed.

Sept. 18. Proof of mailing, filed.

Oct. 27. Motion for adjournment of trial, filed.
Oct. 27. Deposition of Russell L. Swarthout, filed.
Oct. 28. Motion for adj. of trial heard and granted. Thornton, J.
Oct. 29. Deposition of Delmar Stirrup, Robert Lee Sims and Erika Olund, filed.
Nov. 4. Trial adj. without date, request of counsel. Thornton, J.
Nov. 12. Order adjourning trial date. (Dec. 16/69), filed and entered. Thornton, J.
Nov. 14. Notice of trial for Dec. 16/69, filed.
Dec. 8. Subpoenas filed.
Dec. 16. Court trial begins—adj. to Dec. 17/69. Thornton, J.
Dec. 17. Court trial resumed—adj. to Dec. 18/69. Thornton, J.
Dec. 18. Court trial resumed—adj. to Dec 19/69. Thornton, J.
Dec. 19. Court trial resumed—adj. to Dec. 22/69. Thornton, J.
Dec. 22. Court trial resumed—adj. to Dec. 22/69. Thornton, J.
Dec. 23. Court trial resumed—matter taken under advisement—trial concluded. Thornton, J.
Dec. 30. Subpoenas filed.
Dec. 30. Subpoena filed.

1971

Apr. 16. Memorandum of decision—findings of fact—conclusions of law, filed and entered. Thornton, J.
Apr. 16. Proof of mailing filed.
June 9. Judgment on decision by the Court in favor of ptf. in $15,000.00 with interest (also re: payment) filed and entered. Thornton, J.

June 18. Transcripts commencing Dec. 16/69 in 3 vols., filed.
June 18. Transcript of July 7/69, filed.
July 2. Appeal fee of $5.00 received.
July 2. Deft's notice of appeal, filed.
July 6. C. D. 3 $5.00 disbursed.
July 6. Letter re: appeal, filed.
July 6. Proof of mailing filed.
July 19. Tax bill of costs, filed. (in $298.45)
Aug. 2. Stip. and order extending time to Sept. 10/71 to file record on appeal, filed and entered. Kaess, J.
Aug. 2. Transcript of June 24/68, filed.
Sept. 1. Notice of mailing file to CCA, filed.
Sept. 7. Acknowledgement filed.

APPENDIX B

DEFENDANT'S AMENDMENT TO ANSWER

(U. S. District Court—Eastern District of Michigan Southern Division)

(Filed June 27, 1968)

Pursuant to Federal Rules of Civil Procedure, No. 16, a pretrial conference having been considered and the necessity of amending the Answer appearing therein, Defendant, Russell Swarthout, by his attorney, Robert E. Childs, hereby adds (pursuant to Federal Civil Rule 8(c)), an additional Special and Affirmative Defense, as follows:

III.

March 1, 1963, plaintiff, Erika Olund, released for an adequate and valuable consideration any purported cause of action or claim she may have, a true copy of said "Re-

lease" being attached hereto and made a part hereof, thereby discharging defendant, Russell Swarthout, from any and all claims of any kind or nature whatsoever.

Wherefore, defendant Russell Swarthout, reiterates his original demand for judgment for cost.

/s/ Robert E. Childs
Attorney for Defendant

RELEASE

I, Erika Olund, of Miami, Florida, for and in consideration of One ($1.00) Dollar, to me in hand paid by R. Swarthout, do by these presents for myself, my heirs, executors and administrators, remise, release and forever discharge Russell Swarthout, of Detroit, Mich., his heirs, executors, and administrators, of and from any and all manner of action or actions, cause and causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, trespasses, damages, judgments, executions, claims, and demands whatsoever, in law or equity, which against him I have had, now have or which my heirs, executors, or administrators, hereafter can, shall, or may have, for or by reason of any matter, cause, or thing whatsoever.

I further state freely and voluntarily that Russell Swarthout has at no time ever committed any criminal act of violence towards me, or upon my being, of any nature whatsoever.

In witness whereof, I have hereunto set my hand and seal this first day of March, 1963.

/s/ Erika Olund

In the presence of:

Thomas G. O'Connell

APPENDIX C

PLAINTIFF'S REPLY TO DEFENDANT'S AMENDMENT TO ANSWER

(U. S. District Court—Eastern District of Michigan—Southern Division)

(Filed July 5, 1968)

In Reply to Defendant's Amendment to Defendant's Answer wherein is added what is therein described as "an additional Special and Affirmative Defense," and in accordance with the proceedings of the Court and the agreement of the parties at the Pre-Trial Conference held June 24, 1968, Plaintiff, by her Attorney, George F. Fisk, files this Reply; and Plaintiff says:

I.

Replying to Paragraph III, Plaintiff says that the said alleged Release is without legal effect or validity for the following facts and reasons:

(A)—That Plaintiff signed the alleged Release only because of the coercion and duress and undue influence exercised upon, and against her, as hereafter set forth;

(B)—That on the day or days shortly before the date of and the signing of the alleged Release, the Defendant and the Defendant's friend, agent and assistant, Thomas G. O'Connell (who later witnessed the alleged Release) had threatened and menaced Plaintiff with words to the effect that Plaintiff would lose her job and otherwise regret it if Plaintiff caused Defendant any

trouble at all; further, Plaintiff was convinced that these threats could be, and would be, carried out unless she complied with Defendant's wishes in the matter;

(C)—That Plaintiff signed the alleged Release when under great emotional strain; when in fear of the Defendant who had earlier treated her with great violence; also when in fear of Defendant's friend, agent and assistant who had earlier threatened her great harm; also at a time when Plaintiff was alone in her home with no counsel or friend to support or help her deal with Defendant and his friend and agent, both of whom were lawyers and judges at all times when they dealt with Plaintiff in reference to the signing of the alleged Release;

(D)—That at no time was there any effort at reasonable discussion or negotiation, but only the emotional and menacing demand and insistence that Plaintiff sign the single copy of the Release which the Defendant had brought with him, and that Plaintiff accept possession of the $1,000.00 cash which the Defendant had brought with him;

(E)—That Plaintiff requested a copy of the Release before signing, and one was hastily typed and signed by all present; when the signatures were obtained, the Defendant and his friend hurriedly left the premises; a "copy" of the second signed copy of the alleged Release is attached to this reply and made a part hereof;

(F)—That Plaintiff was at the time and place mentioned, *because* of the traumatic injury she had suffered from Defendant, because of the threats

and menaces made against her by Defendant and his friend, *because* of the quite incredulous and unsympathetic treatment she had received from the police, *because* of the knowledge that no attorney desired a case against another attorney, particularly when that other attorney was also a judge (and had friends who were judges), weakened, frustrated, fearful, and, hence, very susceptible to the type of coercion inflicted upon her;

(G)—The alleged Release, signed under the circumstances described, *was drafted by the Defendant, an Attorney,* and covers with great particularity all of the many types of causes and actions which it purports to release; it then has a clause which clearly establishes that the intent of the Release was not to, and did not, apply to one class of actions, namely, actions founded on "criminal acts of violence *** of any nature whatsoever"; and Plaintiff's Complaint in the captioned cause clearly falls within those excluded "criminal acts of violence *** of any nature whatsoever".

Wherefore, Plaintiff asks Judgment as prayed in the Complaint.

/s/ George F. Fisk
Attorney for Plaintiff
2060 Coolidge Highway
Berkley, Michigan 48072
LIncoln 6-3636

Dated: July 2, 1968, Berkley, Michigan.

RELEASE

I, Erica Olund of Miami, Florida, for and in consideration of One Dollar, to me in hand paid by r. Swarthout, do by these presents for myself, my heirs, executors and administrators, remise, release and forever discharge Russell Swarthout, of Detroit, Mich., his heirs, executors, and administrators, of and from any and all manner of action or actions, cause and causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties. covenants, contracts, controversies, agreements, promises, trespasses, damages, judgments, executions, claims, and demands whatsoever, in law or equity, which against him I have had, now have, or which my heirs, executors, or administrators, hereafter can, shall, or may have, for or by reason of any matter, cause, or thing whatsoever.

I further state freely and voluntarily that Russell Swarthout has at no time ever committed any criminal act of violence towards me, or upon my being, of any nature whatsoever. ~~The above statement is false. Russell Swarthout gave me a large sum of money to sign his release.~~

In witness whereof, I have hereunto set my hand and seal this First day of March, 1963

/s/ Erika Olund

In the presence of:

R. L. Swarthout
T. G. O'Connell

**Mar 1, 1963—*

I, Russell L. Swarthout, will not proceed either civil or criminally against Erica Olund for any past acts or present acts as of this date.

/s/ R. L. Swarthout

---

* Italics indicate hand printed and/or handwritten material in original done by Russell L. Swarthout.

APPENDIX D

PLAINTIFF'S AMENDED REPLY TO DEFENDANT'S AMENDMENT TO ANSWER

(U.S. District Court—Eastern District of Michigan—Southern Division)

(Filed May 14, 1969)

In reply to Defendant's Amendment to Answer, wherein was added what is therein described as "an additional Special and Affirmative Defense", and in accordance with the Order of the Court dated April 14, 1969 made on Defendant's Motion to Strike Plaintiff's earlier Reply, and allowing Plaintiff thirty (30) days in which to file an Amended Reply, PLAINTIFF SAYS:

I.

Replying to Paragraph III, being the only paragraph in said Amendment, Plaintiff states the release pleaded by Defendant is void and without legal effect, for the following reasons:

(a)—Duress, coercion, fraud and undue influence practiced upon Plaintiff by the Defendant and his Agents by wrongful advice and statements, and by threats of harm to her person and property and legal rights;

(b)—A total and gross inadequacy of consideration;

(c)—A total lack of agreement and meeting of the minds as evidenced by, among other things, a second instrument dictated by the Defendant and typed by the Plaintiff, a copy of which is attached to this Re-

ply, which also excludes "Acts of violence" for which this action is brought;

(d)—Material unilateral mistake of the Plaintiff, who at the significant time was alone, ill, frightened, without friends or guidance or counsel, and believed it impossible for her to obtain interested professional counsel;

(e)—The alleged release contravenes public policy in that it was part of a plan to conceal a criminal offense; it violates a statute forbidding the concealment of crime;

(f)—The purported release contravenes the established interest of society against allowing the strong and learned of the professions from overpowering or intimidating the relatively weak and uneducated.

Wherefore, Plaintiff asks judgment as prayed in the Amended Complaint, together with any other different or equitable relief needful, just and appropriate in the premises.

/s/ George F. Fisk
Attorney for Plaintiff
2060 Coolidge Highway
Berkley, Michigan 48072
LIncoln 6-3636

Dated: May 13, 1969, Berkley, Michigan

RELEASE

I, Erica Olund of Miami, Florida, for and in consideration of One Dollar, to me in hand paid by r. Swarthout, do by these presents for myself, my heirs, executors and administrators, remise, release and forever discharge

Russell Swarthout, of Detroit, Mich., his heirs, executors, and administrators, of and from any and all manner of action or actions, cause and causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties. covenants, contracts, controversies, agreements, promises, trespasses, damages, judgments, executions, claims, and demands whatsoever, in law or equity, which against him I have had, now have, or which my heirs, executors, or administrators, hereafter can, shall, or may have, for or by reason of any matter, cause, or thing whatsoever.

I further state freely and voluntarily that Russell Swarthout has at no time ever committed any criminal act of violence towards me, or upon my being, of any nature whatsoever. ~~The above statement is false. Russell Swarthout gave me a large sum of money to sign his release.~~

In witness whereof, I have hereunto set my hand and seal this First day of March, 1963.

/s/ Erika Olund

In the presence of:
R. L. Swarthout
T. G. O'Connell

**March 1, 1963—*

I, Russell L. Swarthout, will not proceed either civil or criminally against Erica Olund for any past acts or present acts as of this date.

R. L. Swarthout

---

* Italics indicate hand printed and/or handwritten material in original done by Russell L. Swarthout.

APPENDIX E

DEMAND FOR JURY TRIAL

(U. S. District Court—Eastern District of Michigan—Southern Division)

(Filed May 23, 1969)

Now comes the Defendant, Russell L. Swarthout, by and through his attorney, William A. Bedrosian, and hereby demands a trial by jury of each and every issue in the above entitled cause, in accordance with Rule 38 (b) and (c) of the Federal Rules of Civil Procedure.

Dated: May 22, 1969.

/s/ William A. Bedrosian
Attorney for Defendant
3333 Cadillac Tower
Detroit, Michigan 48226
965-3888

APPENDIX F

EXCERPT FROM MOTION TO STRIKE PLAINTIFF'S REPLY TO DEFENDANT'S AMENDMENT TO ANSWER

(U S. District Court—Eastern District of Michigan—Southern Division)

(Filed April 1, 1969)

• • • • •

5. That a period of nine (9) months has in fact lapsed, and as of this date, Plaintiff has not filed her Amended Reply.

Wherefor, Defendant prays that Plaintiff's Reply to Defendant's Amendment To Answer be dismissed.

/s/ William A. Bedrosian
Attorney for Defendant

APPENDIX G

EXCERPT FROM MEMORANDUM BRIEF IN SUPPORT OF MOTION TO STRIKE PLAINTIFF'S REPLY TO DEFENDANT'S AMENDMENT TO ANSWER

(U. S. District Court—Eastern District of Michigan—Southern Division)

(Filed April 1, 1969)

• • • • •

In this particular case, Plaintiff in answering the Defendant's Amendment to Answer has merely filed a superfluous and repetitious pleading and has not properly answered Defendant's amended affirmative defenses.

Wherefore Defendant prays that Plaintiff's Reply To Defendant's Amendment To Answer be dismissed.

Respectfully submitted,

/s/ William A. Bedrosian
Attorney for Defendant

APPENDIX H

ORDER DENYING MOTION FOR A JURY TRIAL

(U. S. District Court—Eastern District of Michigan—Southern Division)

(Filed September 18, 1969)

At a session of said Court held in the Federal Building, Detroit, Michigan, on September 18, 1969.

Present: Honorable Thomas P. Thornton, United States District Judge.

On May 27, 1969, the defendant filed a motion for a jury trial in the within cause, grounding the said motion upon the following allegations:

> "1. That the above entitled cause was commenced on or about the 28th day of December, 1964. That thereafter the Complaint was amended by the Plaintiff
>
> 2. That subsequently on or about the 24th day of June, 1968, your Defendant filed an amendment to his answer setting forth as an affirmative defense a release.
>
> 3. That approximately nine (9) months later, on May 14, 1969, on order of this Honorable Court the Plaintiff did answer Defendant's amended answer.
>
> 4. That on the 23rd day of May, 1969, your Defendant filed a demand for a jury trial under Rule 38 (b) and (c) of Federal Rules of Civil Procedure requesting a trial by jury of each and every issue in this cause."

The plaintiff opposes said motion and has submitted, at the request of the Court, the pleading entitled "EX-

TRACTION FROM CALENDAR OF SIGNIFICANT DATES BEARING ON DEFENDANT'S MOTION FOR ORDER GRANTING JURY TRIAL", which is attached hereto as Exhibit 1.

Sleeman v. Chesapeake & Ohio Railroad Company, 263 F.Supp. 117 (W.D. Mich 1967) is authority for the following:

"In *Speed v. Transamerican Corp.,* 103 F. Supp. 47 (D.C.Del., 1952), the court said:

'It has been held a party waives his jury trial when he did not request such as to a count which was not a part of a complaint but which could be anticipated it may become part of the complaint. *Gulbenkian v. Gulbenkian,* 2 Cir., 147 F.2d 173, 158 A.L.R. 990. And *Fidelity Deposit Company* [*of Md.*] *v. Krout,* 2 Cir., 157 F.2d 912, decided that where a new count is based on the same issues as the previous counts as to which no jury was requested, that waiver would continue in effect also as to the new count.' 103 F.Supp. 47-48.

Also, in 2B Barron & Holtzoff, *Federal Practice and Procedure,* §873, pp 35-6 (Rules Ed., 1961), the following observation was made:

'Since amendments are freely allowable, it has been held that an amendment of a complaint may completely change the issues and entitles the parties to trial by jury in a case in which before amendment, there was no right of jury trial. But an amendment will not entitle the adverse party to demand a jury trial which he had earlier waived with full knowledge of the real issues to be litigated.'

Plaintiff's amendments have not changed the character of his suit; it remains as it was before. Defend-

ant could have demanded a jury when plaintiff filed his original complaint; however, having failed to do this, defendant cannot now resurrect a right which has long since passed away."

During the course of this litigation there have been multiple court hearings held in the matter, and at all times the defendant has been represented by extremely competent counsel. Pretrials have been held, amendments have been filed, the defense of release was first injected into the litigation in June of 1968, and the real issues to be litigated have been a matter of knowledge to respective counsel since the inception of the lawsuit, with the result that the time for demanding a jury "has long since passed away" and, accordingly, the motion for a jury trial is denied.

/s/ Thomas P. Thornton
United States District Judge.

EXHIBIT 1

EXTRACTION FROM CALENDAR OF SIGNIFICANT DATES BEARING ON DEFENDANT'S MOTION FOR ORDER GRANTING JURY TRIAL

(U.S. District Court—Eastern District of Michigan—Southern Division)

(Filed July 16, 1969)

As requested by the Court at the Hearing in Open Court held July 7, 1969, on the Motion of Defendant for Order Granting Jury Trial, Plaintiff now here sets forth in writing the significant dates extracted from the Court's Docket and referred to in Plaintiff's Counsel's oral argument on that date:

Docket No.	*Date Filed*	*Significant Pleading or Action*
1	December 28, 1964	Complaint filed
13	May 3, 1965	Amended Complaint filed
15	May 24, 1965	Answer to Amended Complaint filed
	(Case at issue then for three (3) years to Pre-Trial and no demand for Jury Trial filed by either party)	
28	June 7, 1968	Notice of Pre-Trial Conference filed Adjourned to June 24, 1968
	June 24, 1968	Pre-Trial had. No request for Jury Trial; but Defendant's request to Amend Answer Adding Affirmative Defense of Release was granted.
29	June 27, 1968	Amendment to Answer filed (adding Affirmative Defense of written release)
30	July 5, 1968	Plaintiff's Reply to Amended Answer filed
	(Case now again at issue and neither party requests Jury Trial)	

Docket No.	*Date Filed*	*Significant Pleading or Action*
32	July 18, 1968	Notice of Trial for November 12, 1968 filed
	(No demand for Jury Trial)	
	November 8, 1968	Trial adjourned without date at request of Counsel
44	April 15, 1969	Order Requiring Plaintiff to Post Security Bond and allowing thirty days to file Reply to Amended Answer
45	May 14, 1969	Bond filed
46	May 14, 1969	Plaintiff's Amended Reply to Defendant's Amendment to Answer and Exhibit filed
47	May 23, 1969	Demand for Jury Trial filed
48	May 27, 1969	Motion for Jury Trial filed

Plaintiff's position as stated in Court is as follows: (1) —due to the lapse of time and the circumstances outlined, both parties have waived their RIGHT to a jury trial, but the Court could grant a jury trial if there appeared, in its discretion, a compelling reason for doing so; (2)—the Plaintiff has for more than three and one-half years relied on the assumption that the case would not be tried by jury, and felt the best interests of the parties and society made a non-jury trial or other disposition preferable; (3)—to grant a jury trial now under these circumstances would probably make Rule 38 (b) meaningless, as a party could hold back an issue, as was done here, or even raise a false issue, and thus avoid the said Rule 38 (b), and its entire purpose and spirit.

/s/ George F. Fisk
Attorney for Plaintiff
2060 Coolidge Highway
Berkley, Michigan 48072
LIncoln 6-3636

Dated: July 16, 1969.

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-374

RUSSELL L. SWARTHOUT,
Petitioner,

vs.

ERIKA OLUND,
Respondent.

PETITION FOR REHEARING ON ORDER DENYING WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Comes now Petitioner Russell L. Swarthout, Pro se, who presents this, his Petition for Rehearing on Order Denying Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, and in support thereof states to the Court:

I

On November 13, 1972, the Court denied Petitioner a Writ of Certiorari to the Court of Appeals. The Petitioner states that he has substantial grounds available although not previously presented to this Court in strict compliance with SCR 58 (2).

The Trial Court gave judgment in a diversity tort action to the Plaintiff.

The Defendant with leave of the Trial Court had filed an Amended Answer interposing the affirmative defense of release. The Defendant filed a reply to the Amended Answer asserting that the release was void and unenforceable by reason of procurement through fraud, duress, coercion and undue influence.

The Trial Court on April 16, 1971 filed the MEMORANDUM OF DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW in this case.

As to FINDINGS OF FACT the Trial Court states: "The Court finds that the claimed release (Exhibits 11 and 12) is invalid as a release and that it is void *ab initio* by reason of fraud, duress, coercion and involuntariness," (Joint Appendix p. 531a).

As to CONCLUSIONS OF LAW the Trial Court states: "However, it seems clear to us that under the law of any of these United States this release would be held void," (Joint Appendix p. 532a).

The United States Court of Appeals for the Sixth Circuit on May 5, 1972 affirmed the Trial Court decision. To the Defendant's argument on appeal that the Trial Court erred in finding inoperable a prior release by Plaintiff of all claims against Defendant the Court of Appeals in its Opinion stated: "Swarthout also urges that the release could not be avoided by Olund without tender of the consideration given in exchange therefor, relying on the law of Florida, where the release was executed. We need not reach this issue. The judgment was offset by the consideration. This court "must disregard any error . . . which does not effect the substantial rights of the parties." R.61, Fed. R. Civ. P.; see 28 U.S.C. §2111. Further, the issue was not raised below and will not be considered on appeal. See *Wiper* v. *Great Lakes Engineering Works*, 340 F. 2d

727, 731 (6th Cir.), cert. denied, 382 U.S. 812 (1965). (Appendix A hereto, infra p. 4a).

II

Petitioner herein respectfully submits that the Trial Court decision was erroneous in that it decided as a matter of law that the written release executed between the parties to this action was void rather than voidable because such a determination was contrary to a settled rule of the United States Supreme Court and the great weight of authority. Thus, where threats of violence against a woman plaintiff, her husband, and children prompted her to execute a deed to real property, such threats constituted duress on her mind which had the effect of making her conveyance voidable and subject to affirmance or disaffirmance but not void.

> "Acts induced by duress such as is here relied on, which operate only on the mind and falls short of actual physical compulsion, are not void in law, at the election of him whose act was induced by it." *Barnette* v. *Wells Fargo Nevada National Bank*, 270 U.S. 438, 444; 70 L. ed. 669, 674, 675 (1925). See also 77 A.L.R. 2d. 428.

The Trial Court in order to arrive at a verdict for Plaintiff concluded, "That the claimed release herein (Exhibits 11 and 12) is invalid as a matter of law. The atmosphere in which this plaintiff's signature was obtained, together with the circumstances attendant thereto, preclude the possibility of this having been a free and voluntary act by plaintiff. The very presence of defendant, an attorney and judge, and of his companion, also a judge and the person who had previously told plaintiff that he would see to it that she would lose her job if she did anything about the case, constituted coercion and duress.

Plaintiff was as much alone and unprotected in this situation as she had been in the prior one with defendant on the night of January 16, 1963." (Joint Appendix p. 532a).

The foregoing acts recited by the Trial Court may have amounted to duress and coercion which operate on the mind of plaintiff and render the act of signing a release voidable which may be affirmed or disaffirmed at her election, but this record is completely barren of any actual physical compulsion that would render a release void.

Hence, the 6th Circuit, having apparently adopted the finding of the Trial Court that the release was void rather than voidable and therefore unenforceable, also acted contrary to a settled precedent of this Court and the great weight of authority.

This erroneous determination was not harmless error which did "not affect the substantial rights of the parties" as the 6th Circuit claimed (Appendix A hereto, infra p. 4a). Had the Trial Court concluded that the release was merely voidable, then Florida law, as recited in *Davis* v. *Hefty Press, Inc.*, 11 So. 2d. 884 (1943), and the great weight of authority represented by 77 A.L.R. 2d. 428, would have dictated a verdict for the petitioner.

Under Florida law and the great weight of authority the only manner in which Plaintiff could legally disaffirm her release and thus overcome the presumption of validity is by offering competent proof that she had returned or offered to return the $1,000.00 paid to her by defendant as consideration for the release. Since Plaintiff failed to offer such proof, it was incumbent upon the Trial Court to uphold the validity of the release and enter judgment for Defendant.

It is significant that a Florida Court expressly rejected the expedient, adopted by the Trial Judge in this case and

affirmed by the Sixth Circuit of crediting the consideration for release on a judgment awarded to Plaintiff after the release is set aside; in *Overstreet* v. *Atlantic Coastline R.R. Co.*, 152 So. 2d 188 (1962), the Court declined the offer of Plaintiff to credit in the foregoing manner the money consideration she received for executing a release, upheld the validity of the latter by declining to set it aside because she had refused to return the consideration for the release, and concurred in the dismissal of her action for damages on the released claim.

The necessity of tendering the consideration before a voidable release can be disaffirmed is recognized by the great weight of authority. 134 A.L.R. 6. The Michigan Supreme Court, in adopting this principle demonstrated its rationale by pointing out that without the necessity for a tender, a climate would be created in which free and easy avoidance of releases would discourage settlement of disputes and conflict with a longstanding policy of our courts favoring the private resolution of legal controversies. *Carey* v. *Levy*, 329 Mich. 458 (1951).

As another Court has pointed out:

> "To permit her to retain the money that she got under the release, and also to repudiate same, would allow her to retain the benefits and reject the burdens. It would allow her to divide, or separate the transaction by accepting the favorable part and rejecting what was unfavorable to her."

Birmingham Ry., Light and Power Co. v. *Jordan*, 54 So. 280, 282 (1911).

If Plaintiff had been required to follow the precedent of this Court in its prior decision in *Barnette* v. *Wells Fargo Nevada National Bank, supra*, the Plaintiff would have had the additional burden of proving that she had disaffirmed

her voidable release within a reasonable time. The Court of Appeals has acknowledged this requirement by ruling that an attempted recission, of a release for fraud which came 21 months after execution of the latter, was too late. *Jack Mann Cheverolet* v. *Associates Investment Co.*, 125 F.2d. 778 (1942).

In the case before us, a release was executed on March 1, 1963; yet Plaintiff made no effort to avoid it until Defendant pleaded same and she filed a reply claiming it was void on July 5, 1968. Furthermore, plaintiff did not commence her action for damages, until December 28, 1964, or almost 22 months after the execution of the release. It is clear, assuming a voidable document, that her attack on its validity came too late.

Finally, the Court of Appeals refused to decide the issue of whether the release could be avoided under Florida law without a tender of the consideration given to her, because it had not been raised in the Trial Court. Not so. Defendant, having pleaded the release, was entitled to rely on Florida law and the great weight of authority that it was at worst voidable and thus enforceable until plaintiff sustained her burden of proving disaffirmance. The burden of raising the issue of tender in the Trial Court was on plaintiff, not defendant; hence, defendant cannot be penalized on appeal if it was not raised below. The issue presented for decision by the Trial Court was whether the release was voidable but valid because there had been no disaffirmance by plaintiff or void with no requirement of rescission. Trial Court, in placing a void construction on the release, acted contrary to Florida law and the great weight of authority, in a manner which substantially prejudiced petitioner's rights.

III

CONCLUSION

For the reasons above submitted, petitioner respectfully suggests that this Court reconsider its Order Denying Certiorari, withdraw said Order, and grant Certiorari herein to the Court of Appeals.

Respectfully submitted,
RUSSELL L. SWARTHOUT
Pro Se
8900 E. Jefferson Avenue, #202-3
Detroit, Michigan 48214
(313) 823-3420

CERTIFICATE

Counsel hereby certifies that the foregoing Petition For Rehearing is presented in good faith and not for delay and that it is restricted to grounds specified in Rule 58 (2) of the Rules of this Court.

RUSSELL L. SWARTHOUT
Pro Se

Dated: December 7, 1972

No. 71-1716

UNITED STATES COURT OF APPEALS
For The Sixth Circuit

ERIKA OLUND,
Plaintiff-Appellee,

v.

RUSSELL L. SWARTHOUT,
Defendant-Appellant.

APPEAL from the United States District Court for the Eastern District of Michigan, Southern Division.

Decided and Filed May, 5, 1972.

Before PHILLIPS, Chief Judge, McCREE, Circuit Judge, and ENGEL*, District Judge.

PHILLIPS, Chief Judge. This is an appeal from a judgment for plaintiff in a diversity tort action. We affirm.

Only a brief statement of the procedural facts is required. Erika Olund filed this action against Russell Swarthout in December, 1964. Swarthout answered in May, 1965, denying the material allegations of the complaint. Some three years later, following the pretrial conference, Swarthout amended the answer to interpose the affirmative defense of release. One week later Olund filed a reply to the amended answer, asserting that the release was void and unenforceable by reason of procurement through fraud, duress, coercion, and undue influence.

*Honorable Albert J. Engel, Judge, United States District Court for the Western District of Michigan, sitting by designation.

In May, 1969, Olund filed an amended reply to the amended answer. Swarthout filed a demand for a trial by jury as a matter of right on all issues nine days thereafter. He further moved for a jury trial on all issues as a matter of discretion. Following a hearing on the motion, Judge Thomas P. Thornton denied the motion and ordered the entire case tried without a jury.

Trial to the Court consumed five trial days; conflicting evidence was introduced as to all material issues. Judge Thornton found for plaintiff in the amount of $15,000 compensatory damages. Swarthout appeals, contending that he was deprived of his right to trial by jury and that the verdict was unsupported by the evidence and excessive.

Only the jury trial issue requires extended consideration. The Federal Rules of Civil Procedure provide:

"Rule 38.
"JURY TRIAL OF RIGHT

• • •

"(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party."

"Rule 39.
"TRIAL BY JURY OR BY THE COURT

"(b) By the Court. Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to

demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issue."

Before this Court Swarthout contends that the filing of Olund's amended reply gave him ten days in which to demand a jury trial on the issues presented therein and that his demand was served within that ten day period. He further asserts that a jury trial on all issues should have been ordered as a discretionary matter. We disagree with these contentions. The demand for trial by jury was first injected into the case some four and one-half years after the action was commenced, following pleading amendments, extensive discovery, and a pretrial conference. The amended reply introduced no new issues into the action. The issue of release was asserted and joined in July, 1968. Under these circumstances, the demand was untimely. See *Western Geophysical Co. of America* v. *Bolt Assoc., Inc.* 440 F. 2d 765, 769 (2d Cir. 1971); *Connecticut General Life Ins. Co.* v. *Breslin*, 332 F. 2d 928, 931 (5th Cir. 1964); 5 Moore, Federal Practice, ¶ 38.41 (2d ed.); 9 Wright & Miller, Federal Practice & Procedure, Civil § 2320. Further, we find no abuse of discretion under R. 39(b), Fed. R. Civ. P.

Swarthout's contentions that there is insufficient evidence to support the findings of liability, unenforceability of the release signed by Olund, and amount of damages are wholly without merit. We have given "due regard . . . to the opportunity of the trial court to judge the credibility of the witnesses" and are unable to say that his findings of fact are clearly erroneous. R. 52(a), Fed. R. Civ. P.

Swarthout also urges that the release could not be

avoided by Olund without tender of the consideration given in exchange therefore, relying on the law of Florida, where the release was executed. We need not reach this issue. The judgment was offset by the consideration. This court "must disregard any error . . . which does not affect the substantial rights of the parties." R. 61, Fed. R. Civ. P.; see 28 U.S.C. § 2111. Further, the issue was not raised below and will not be considered on appeal. See *Wiper v. Great Lakes Engineering Works*, 340 F. 2d 727, 731 (6th Cir.), cert. *denied*, 382 U.S. 812 (1965).

Affirmed.